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CLERK OF THE SUPREME COURT

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 840.....

CLAIRE A. PEKRAS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

No. 841.....

JOHN PEKRAS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

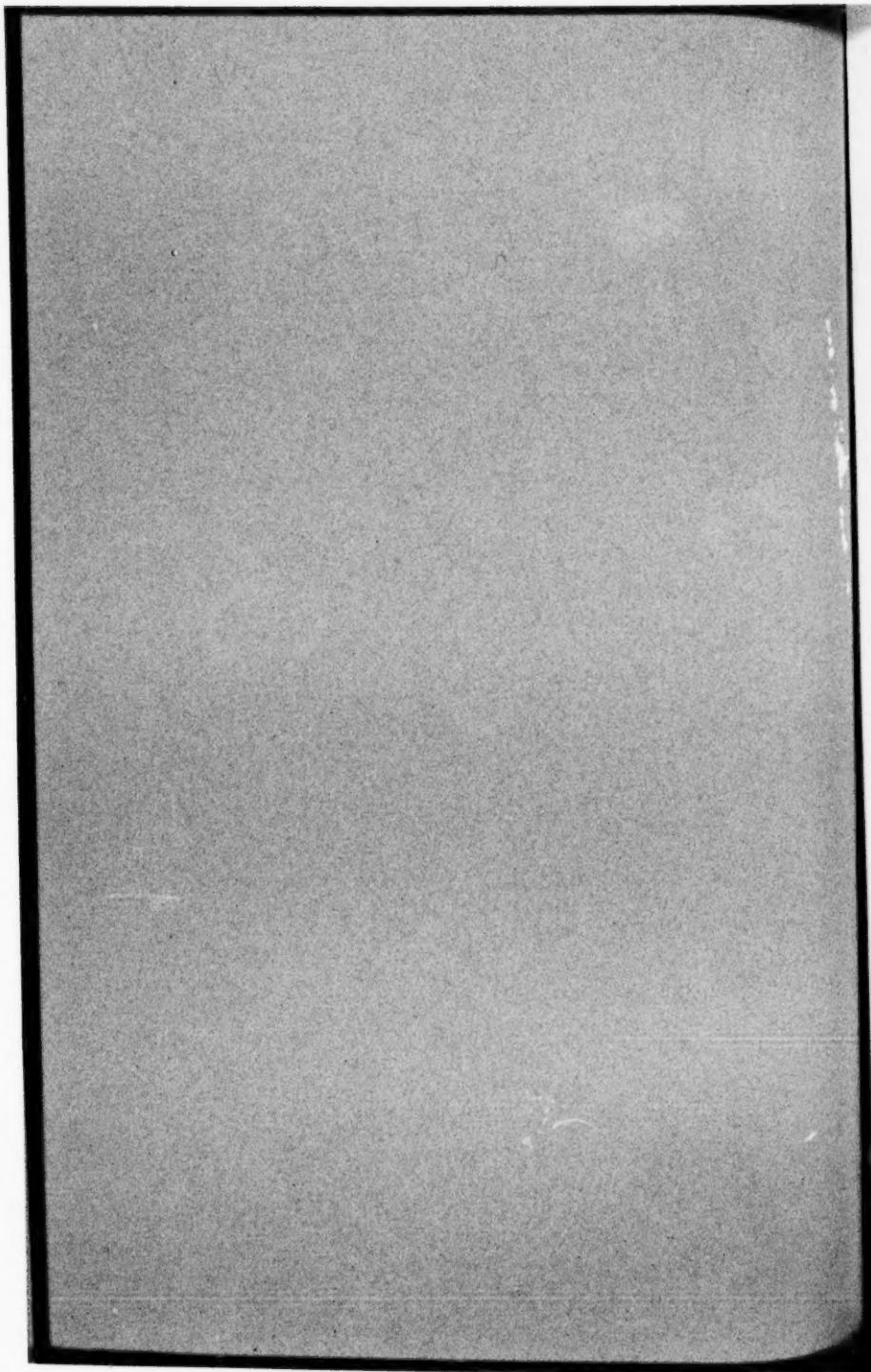
PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit and
BRIEF IN SUPPORT OF PETITION.

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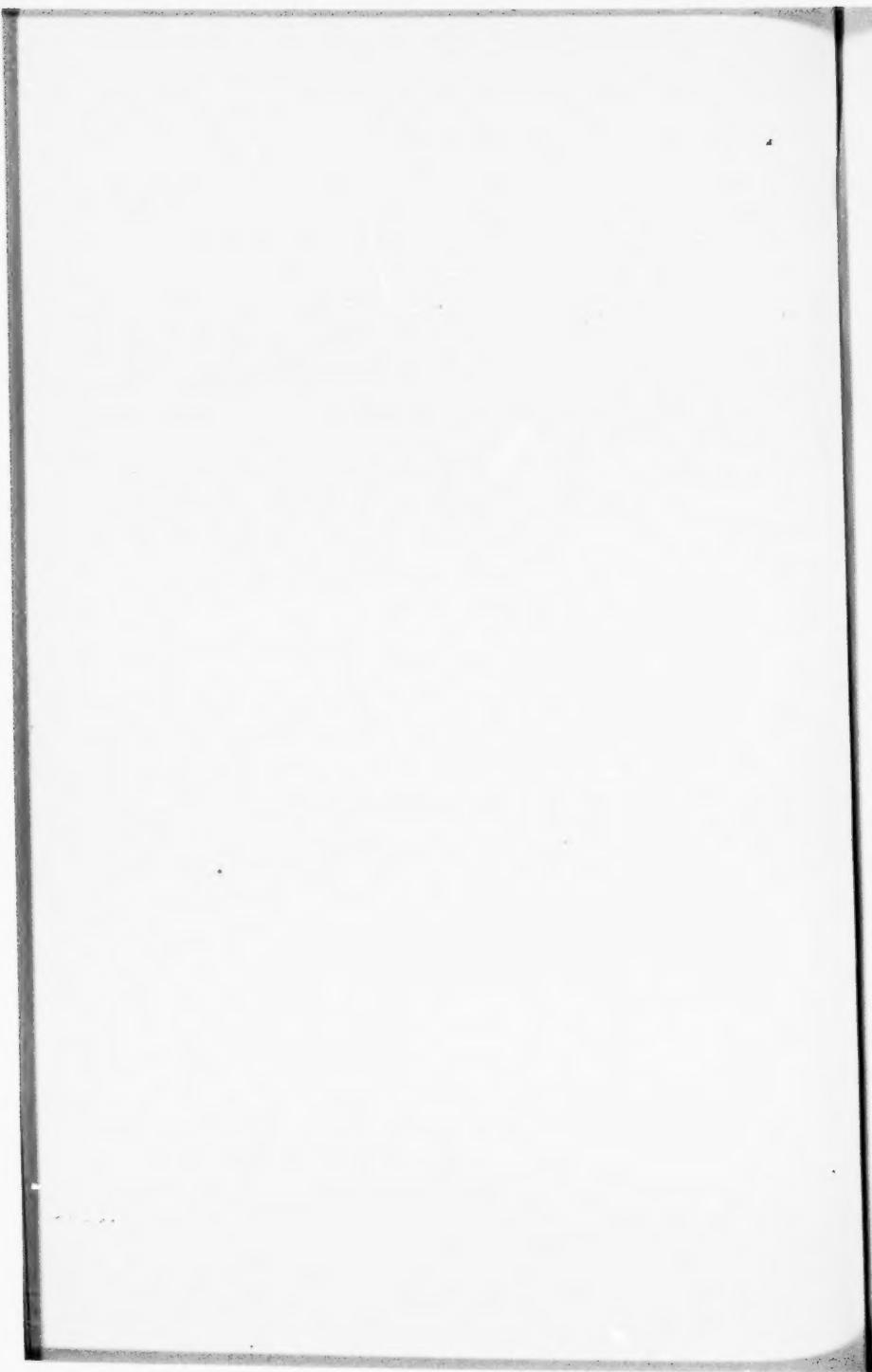
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PETITION FOR WRITS OF CERTIORARI

To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:

This petition of Claire A. Pekras and John Pekras,
petitioners, respectfully shows unto this Honorable Court:

A.

Summary Statement of Matter Involved.

These two cases originated in The Tax Court of the United States. They were submitted to that Court on joint stipulation and decided, adversely to petitioners, in a single Memorandum Opinion. They were argued together before the United States Circuit Court of Appeals for the Sixth Circuit. By joint order the ruling of The Tax Court was affirmed without detailed opinion. A joint Petition for Rehearing was filed and overruled by said Circuit Court of Appeals, likewise without opinion.

Hence these cases are separately docketed but this joint petition is filed.

These cases contest deficiency assessments of income taxes for 1940. In that year petitioners sold their interests in certain motion picture theatres in Elyria, Ohio.

Petitioner, Claire A. Pekras, owning the Capitol Theatre, sold (1) her Building Rights and Equipment for \$75,000, and (2) her leasehold for \$105,000.

Petitioner, John Pekras, sold (1) his future lease of New Rivoli Theatre for \$49,000, (2) his Building Rights and Equipment of Lincoln Theatre for \$20,000 and, (3) his leasehold covering the Lincoln Theatre site for \$60,000.

Since neither petitioner had any capital investment in any one of these three leases recoverable, while owned by them, in whole or part by means of any income tax allowance or deduction; and since the Treasury Regulations have for years provided, and still do provide, that any recovery by a lessee of capital invested in a lease shall be had under Section 23(a), Internal Revenue Code, as a form of rental expense, rather than under Section 23(l) as depreciation; both petitioners reported their profit from sale of these leases as long-term capital gains, only 50% thereof being taxable under Section 117(b), Internal Revenue Code.

Respondent contends such leaseholds are not capital assets under Sec. 117(a)(1), Internal Revenue Code, and that the said gains are ordinary income and 100% taxable. The assessments here contested reflect such contention.

The Tax Court supported its decision by a conclusion of fact directly contrary to the facts stipulated by the parties and expressly found by that Court.

B.

Opinions and Records, Below.

The Memorandum Opinion of The Tax Court is reprinted in full in the Record. (C. A. P. Rec. pp. 22-26).

The order of the Circuit Court of Appeals appears in full in the Record. (C. A. P. Rec. p. 35; J. P. Rec. p. 19.)

The joint Stipulation of Facts and Tax Court Opinion were included only in the Claire A. Pekras case Record. References to that Record are identified as "C. A. P. Rec.," while references to the John Pekras case Record are identified as "J. P. Rec."

C.

Statement of Basis of Jurisdiction.

Both petitioners filed their petitions with the Board of Tax Appeals, now the Tax Court, that of Claire A. Pekras being No. 112,359 and that of John Pekras being No. 112,360 on the docket of that Court. The two cases were submitted on joint stipulation (C. A. P. Rec. pp. 14-22), and decided by one Memorandum Opinion, the full text of which is found in Claire A. Pekras Record, pp. 22-26, entered May 31, 1943. (C. A. P. Rec. p. 27.)

Petitions for Review were duly filed in the United States Circuit Court of Appeals for the Sixth Circuit, that of Claire A. Pekras being in case No. 9612 and that of John Pekras being in case No. 9613, on the docket of that Court. The two cases were argued together on Dec. 10,

1943 and on Dec. 16, 1943 an order affirming the ruling of the Tax Court was entered. (C. A. P. Rec. p. 35; J. P. Rec. p. 19.) Petition for Rehearing (C. A. P. Rec. pp. 39-50; J. P. Rec. pp. 23-34) was filed Jan. 6, 1944 and denied, without opinion, Feb. 23, 1944. (C. A. P. Rec. p. 51; J. P. Rec. p. 35.)

The jurisdiction of this Honorable Court is invoked under Title 28, Section 347, paragraph (a), United States Code (Judicial Code, section 240, as amended).

D.

The Questions Presented.

The ultimate question presented is:

What is the proper construction and true meaning of the following language in Sec. 117(a)(1) of Internal Revenue Code:

“The term ‘capital assets’ * * * does not include * * * property * * * of a character which is subject to the allowance for depreciation provided in section 23(l) * * *.”

The Records in these cases present, as incident to the solution of that ultimate question, four specific questions.

One. Is a leasehold interest in lands, as distinguished from interests in buildings on such lands and equipment in those buildings, property of a character which is subject to the specific allowance for depreciation provided by Section 23(l), Internal Revenue Code?

Two. Is such a leasehold, as to which no recovery of capital investment could have been had, at any time while the taxpayer owned it, by means of any income tax allowance for, in lieu of, or in the nature of depreciation property; of a character which is subject to the specific statutory allowance for depreciation?

Three. Shall a policy of taxpayer entrapment, by resort to interpretations contrary to its Regulations, indulged

in by the Bureau of Internal Revenue, be approved, without opinion, as the law of the land?

Four. Is a conclusion of the Tax Court, contrary to its own express findings of stipulated facts, binding upon reviewing courts?

E.

Reasons for Allowance of the Writs.

We believe the discretion of this Honorable Court will dictate the allowance of the requested Writs of Certiorari, for the reasons:

I. That the Circuit Court of Appeals for the Sixth Circuit has in these cases decided an important question of federal law, namely, the interpretation of Internal Revenue Code, Section 117(a)(1), which question has not been, but should be, settled by this Honorable Court.

II. That the said Circuit Court of Appeals, by affirming the Tax Court in these cases, decided such question of federal law in a way probably in conflict with applicable decisions of this Honorable Court, in that:

Such decision in effect holds that any leasehold, whether it covers land only, buildings only, or lands and buildings, and regardless of whether or not there is a capital investment therein, is depreciable property. Such holding is erroneous since:

(a) It fails to give effect to the words "is subject" and "the allowance" in Section 117(a)(1), Internal Revenue Code.

(b) It ignores the lawfully required allocation of cost and sale price to lands and improvements thereon separately.

(c) It ignores the rule that lands or interests therein are not depreciable and the further rule that it is only the capital investment, not value, which is recoverable by a taxpayer lessee by means of any income tax deduction.

III. Respondent has by long continued Regulations instructed taxpayers that any recovery by lessees of capital investment in leaseholds is under Section 23(a), as a form of rental expense, rather than under Section 23(l), as depreciation. After these petitioners, in determining the advisability of making these sales, had relied on such Regulations, the Respondent adopted a construction contrary to those Regulations and assessed the deficiencies herein contested.

Shall such deliberate taxpayer entrapment be judicially approved?

IV. In these cases the Tax Court, after making specific findings of stipulated facts, bases its conclusion upon factual statements directly contrary to such prior findings. By denying our Petition for Rehearing the Circuit Court of Appeals refused to review such factual inaccuracy specifically pointed out therein. (C. A. P. Rec. p. 45; J. P. Rec. p. 29.)

Shall conclusions of fact, essential to its decision, found by any trier of facts, be conclusive upon reviewing courts when obviously untrue and against the manifest weight of the evidence?

In support of the foregoing grounds of application for these writs of Certiorari petitioners submit the accompanying brief.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court, on a day certain to be named therein, a full and complete transcript of the records of the proceedings in the cases numbered and entitled on its docket as "No. 9612, *Claire A. Pekras, Petitioner, vs. Commissioner of Internal Revenue, Respondent,*" and "No. 9613, *John Pekras, Petitioner, vs. Commissioner of Internal Revenue, Respondent,*" to the end that the said causes may

be reviewed and determined by this Court as provided by law; that the judgments in said cases may be reversed with costs; and for such other and further relief as may be appropriately granted in the premises.

ROBERT H. RICE,

Counsel for Petitioners.